85-1181

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

REGINA S. ENNIS,

Petitioner

v.

NEW JERSEY BELL TELEPHONE CO.,

Respondent

Civil Action Number: 80-3633

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S DUE PROCESS RIGHT TO NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD ARE UNCONSTITUTIONALLY ABRIDGED BY THE PRE-TRIAL DISMISSAL OF PETITIONER'S CASE, ENTERED AS A SANCTION FOR DELAYS CAUSED BY THE CONFIRMED TEMPORARY PHYSICAL INCAPACITY OF PETITIONER'S CHOSEN COUNSEL.

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STATEMENT OF JURISDICTION

1. Review is sought of the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit entered on August 12, 1985, affirming the judgment of dismissal of the United States District Court for the District of New Jersey.

2. A timely Petition for Rehearing *en banc* was denied on September 12, 1985.

3. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Third Circuit is conferred by 28 U.S.C. section 1254(1).

STATEMENT OF STATUTES INVOLVED

A. Civil Rights Act, 42 U.S.C. 1981

B. Title VII of the Civil Rights Act of 1964
42 U.S.C. 2000e(2)(a)
2000e(5)(b)

C. Equal Pay Act of 1963
29 U.S.C. 206(d)(1)

D. Federal Rule of Civil Procedure 37

E. 28 U.S.C. 1343(4)

F. 28 U.S.C. 1254(1)

G. United States Constitution — Fifth Amendment

H. United States Constitution — Sixth Amendment

I. United States Constitution — Fourteenth Amendment

A. CIVIL RIGHTS ACT

42 U.S.C. 1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties,

give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

B. TITLE VII

42 U.S.C. 2000e-2 Discrimination because for race, color, religion, sex or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. 2000e-5

(f) Civil action by Commission, Attorney General, or person aggrieved.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may

bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and in

such circumstances as the complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of actions brought under this title [42 USC sec. 20003 et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been

committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principle office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 USC sec. 1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

C. EQUAL PAY ACT OF 1963

29 U.S.C. 206

(d)(1) No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

D. FEDERAL RULE OF CIVIL PROCEDURE 37

Failure to Make or Cooperate in Discovery: Sanctions

(b) Failure to Comply with Order (1) Sanctions by court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule of Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(c) An order striking out pleadings or parts thereof, of staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

E. 28 U.S.C. 1343(4)

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States and agency thereof, or any officer or employee thereof in his official capacity.

Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

F. 28 U.S.C. 1254(1)

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

G. UNITED STATES CONSTITUTION — FIFTH AMENDMENT

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, without due process of law, nor shall private property be taken for public use, without just compensation.

H. UNITED STATES CONSTITUTION — SIXTH AMENDMENT

Rights of the accused.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

I. UNITED STATES CONSTITUTION — FOURTEENTH AMENDMENT

Section 1 Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IN THE

UNITED STATES SUPREME COURT

REGINA S. ENNIS,

Petitioner

v.

NEW JERSEY BELL TELEPHONE CO.,

Respondent

Civil Action Number: 80-3633

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF CASE

The basis for this appeal came into being long before the case at bar existed. Rather, the chain of events which now bring petitioner before this Honorable Court was set in motion on October 20, 1976, when petitioner's counsel sustained severe and crippling injuries in an automobile accident — injuries with remissions and exacerbations, requiring repeated life-threatening surgeries and lengthy periods of hospitalization and disability throughout a span of ten years in the lifetime of petitioner's counsel. Nevertheless, rather than concentrate on her own physical problems, petitioner's counsel continued in the practice of law.

Petitioner's counsel came to represent petitioner, Regina Ennis in the autumn of 1980 and on November 7, 1980 filed, on her behalf a Complaint in the United States District Court for the District of New Jersey, seeking monetary damages and injunctive relief from respondent, New Jersey Bell Telephone Company, for unlawful sex and race discrimination in employment. Jurisdiction was based on 42 U.S.C. section 1981, 42 U.S.C. section 2000(e) *et seq.*, 29 U.S.C. 206(d)(1), and 28 U.S.C. sections 1331 and 1343(4), as amended. Respondent's Answer was filed on June 4, 1981 and, thereafter, the parties engaged in ongoing discovery, punctuated by two short hospitalizations of petitioner's counsel. Trial was scheduled for December 14, 1981, but was continued at the joint request of counsel for the parties due to mutual scheduling conflicts, as well as incomplete discovery and, more significantly, the concerns of respondent's counsel that they had no opportunity to conduct meaningful settlement discussions.

Trial was adjourned to March 15, 1982, and then again to April 26, 1982, due to the United States Magistrate's vacation schedule. By letter dated March 16, 1982, counsel advised the Court and opposing counsel of her hospitalization, as well as the anticipated period of incapacity, and requested an adjournment of the trial date. The trial date was rescheduled to July 6, 1982. Though both the physician's letter and petitioner's counsel's letter indicated a period of disability from March 14, 1982 through July 1, 1982, the United States Magistrate declared the due date for the Joint Final Pre-Trial Order to be May 26, 1982, "notwithstanding the illness of Ms. Thompson. . . ."

On April 6, 1982, United States Magistrate Hammill scheduled a conference for April 28, 1982 and insisted on petitioner counsel's personal appearance at that time, regardless of her recuperation of physical health, "unless

Ms. Thompson is actually hospitalized." Counsel for petitioner promptly advised the District Court of her impending surgery, estimating the revised date of her return to her professional responsibilities, including with her correspondence a letter from her physician. Trial was thus adjourned to Monday, October 18, 1982.

Having been advised, in advance, that petitioner's counsel would not be returning to her practice before September 1, 1982, counsel for respondent, on August 24, 1982, filed her second and duplicative Motion For Summary Judgment. Since petitioner's counsel had not yet been released by her physician, an extension within which to respond was granted by the court.

On September 27, 1982, nearly one month before trial was scheduled to commence, petitioner's counsel advised counsel for respondent of her intention to substitute one expert for another and additionally therein offered to submit both experts for deposition at respondent's counsel's convenience. Because petitioner counsel's hospitalization having commenced within one week of filing the Joint Pre-Trial Order, and having been physically incapacitated and away from her practice until two weeks earlier, she was not in possession of any reports from experts, but, nevertheless, offered to submit the experts for deposition in order to avoid any prejudice to counsel for respondent.

On or about October 4, 1982, respondent's counsel sought to bar the testimony of petitioner's experts and telephoned United States Magistrate Hammill to request a conference. Both opposing counsel and the United States Magistrate were advised that petitioner's counsel was on trial out of state through October 14, 1982, and thus unavailable. By letter dated October 7, 1982, respondent's counsel specified in writing to United States Magistrate Hammill the relief she sought. A copy

of said letter was received by petitioner's counsel on October 12, 1982, by which time United States Magistrate Hammill had already entered an ex parte Order barring petitioner's experts from testifying at trial.

Petitioner's counsel appealed the United States Magistrate's Order and oral argument was heard on November 5, 1982 before the trial judge, The Honorable John F. Gerry. The trial Court modified the United States Magistrate's Order and allowed petitioner to present the testimony of her experts at trial and provided a time frame for the submission of expert reports and the taking of expert depositions. Further, the Court sanctioned counsel for petitioner and ordered that "the costs of reports and reasonable costs for the depositions are to be borne by petitioner."

Respondent's Motion for an Order quashing trial subpoenas and barring certain fact witnesses was also denied. However, said Order also directed that respondent may depose certain of the challenged witnesses within (30) days of the date entered, and sanctioned petitioner by placing the costs of all depositions respondent chose to conduct upon petitioner. In order to give respondent enough time to conduct the discovery allowed therein, and insofar as respondent's counsel had indicated an intention to withdraw and substitute new counsel, Judge Gerry, *sua sponte*, took the case off the trial list, without date, notwithstanding the concern expressed by petitioner's counsel that the trial should proceed.

Two months later, opposing counsel notified the Court that she was no longer representing the respondent. It wasn't until nearly three (3) months after that, on February 18, 1983, that substitute counsel entered appearance for respondent. Petitioner's counsel was unavailable until after May 1, 1983, due to her emergency hospitalization on February 27, 1983, for complicated neurosurgery performed on an emergency basis.

The Court held a status conference on June 28, 1983, and entered an Order on July 21, 1983, setting forth new time frames for the submission of expert reports and depositions of experts and further extending the time within which respondent could depose petitioner's fact witnesses which were the subject of the Court's previous Order dated November 17, 1982.

The Order of July 21, 1983, was prepared and submitted for Judge Gerry's signature by respondent's counsel. The Order was signed and entered by Judge Gerry and then returned to respondent's counsel for forwarding to petitioner's counsel. It was not until August 3, 1983 that the Order dated two weeks earlier (July 21, 1983) was received in petitioner's counsel's office under cover letter from respondent's counsel dated July 29, 1983. Needless to say, compliance with the provision requiring identity of any other experts within two weeks of the date of the Order was an absolute impossibility, due solely to the manner of transmittal. Petitioner's counsel did forward, under cover letter dated August 16, 1983, within two (2) weeks of her receipt of the said Order, the written report of one expert and in the same correspondence, identified her other expert providing respondent his title, address and a description of his expertise.

As of September 30, 1983, neither expert had been deposed nor had any request for depositions ever been communicated or tendered by respondent's counsel. Nor had respondent's counsel made any effort, [as required by the July 21, 1983 Order] during the thirty day period from August 16, 1983, to September 16, 1983, to depose any of the individuals which petitioner listed in her August 16, 1983 letter as potential trial witnesses. Further, although petitioner identified the subject matter of the testimony sought by the person previously identified as the personnel manager of New Jersey Bell, respondent's counsel failed to identify, in writing, within the two weeks required by the said Order the person or persons competent to testify concerning this subject matter. In

fact, with the exception of petitioner counsel's submissions throughout the month of August, 1983, there was absolutely no communication between petitioner's counsel and respondent's counsel until both counsel received notice scheduling the matter for trial on October 17, 1983. Meanwhile, the time within which respondent's counsel was to take depositions of any expert or fact witnesses identified by petitioner's counsel, pursuant to the terms of the July 21, 1983, Order, had expired weeks earlier and petitioner's counsel would have been well within her rights to have refused allowing the depositions of any of her witnesses and insisted on proceeding to trial. However, in the interest of expediency and concluding a long overdue matter, petitioner's counsel politely agreed to allow the depositions of her experts, as well as any other witnesses respondent wished to depose, to take place on October 12, 1983, literally on the eve of trial.

Trial was scheduled to commence on October 17, 1983. By letter dated October 11, 1983, respondent's counsel requested that the trial be continued to November 7, 1983, since respondent's counsel had assumed that trial of this matter would occur in late November or early December. Over petitioner counsel's objections, the trial was continued to November 7, 1983. By letter dated October 18, 1983, respondent's counsel again requested a postponement of the trial date until November 15, 1983, and same was granted.

By agreement of counsel, the deposition of petitioner's expert, Dr. William King, was taken on October 21, 1983, after two (2) eleventh hour re-schedulings dictated by the witness' professional (medical) emergencies. At that deposition, there arose a dispute between counsel as to the extent of respondent's entitlement to review medical records of petitioner which not only extended backwards in time nearly twenty years, but also covered portions of petitioner's medical history for medical conditions which even a lay

person would obviously recognize as being totally unrelated to the petitioners injuries herein. Moreover, when the dispute arose as to the extent to which petitioner had waived her physician-patient privileges by placing her physical condition in issue herein, petitioner's counsel promptly and logically offered to submit petitioner's entire medical record to the Court for an in camera inspection.

On October 31, 1983, respondent's counsel filed a Motion to Compel Discovery raising the dispute as to the extent of the physician-patient privilege, right to privacy, waiver, and scope. Respondent's counsel insisted that respondent had been deliberately denied access to critical information. Given the dispute as to the scope and what petitioner's counsel, in good faith, considered to be the oppressive nature of Dr. King's deposition, petitioner's counsel deemed it considerably more prudent to await a determination on that Motion before taking the deposition of the statistical expert, in view of the likelihood of scheduling a re-deposition of that expert at a later date. Said Motion to Compel Discovery was listed for November 18, 1983, and was referred to United States Magistrate Simandle's office for disposition. In September and October, 1983, petitioner's counsel experienced a relapse and in November, 1983, her condition once again became acute. Her neurosurgeons wished to re-hospitalize her for surgery as soon as possible. During this same period of time, petitioner's counsel became aware that she was early into her first and, inevitably, only pregnancy. She so advised the Magistrate and requested additional time within which to respond to respondent's counsel's Motion to Compel Discovery.

Rather than improve, counsel for petitioner's physical condition deteriorated rapidly. By correspondence dictated from her home on December 13, 1983, and December 15, 1983, counsel so informed the United States Magistrate and opposing counsel. She therein advised of

further difficulties with her office (moving and personnel problems) which compounded communication gaps and would have made the life of any healthy attorney considerably overburdened. Further, on December 16, 1983, at the request of petitioner's counsel and on her behalf, M. Mark Mendel, Esquire, telephoned the offices of Magistrate Simandle for the purposes of communicating to His Honor counsel's acute condition and physical inability to communicate with the Court on her own behalf. Mr. Mendel spoke to the Magistrate's law clerk, Jane Goode, and was advised that Magistrate Simandle would not accept his call, even though the specific purpose and content of same had been disclosed.

Thereafter, between December, 1983 and May, 1984, while petitioner's counsel endeavored in her frail and infirm state to communicate both directly and indirectly with the Court below and opposing counsel, and through those communications to impart some appreciation for the gravity and scope of her difficulties, counsel was met with ever increasing hostility and procedural posturing by respondent's counsel, who, through skillful maneuvering and the appearance of innocence, placed a virtual "score card" before the Court. With plaintiff's counsel impaired and unable to compete in this olympiad of paper, the Court predictably declared it a "forfeit." In fact, the Court below was so unfairly influenced by the respondent counsel's unrelenting assaults upon petitioner's counsel that the Court was entrapped into a mis-construction of the facts which led to the ultimate pre-trial dismissal of petitioner's entire case by the September 13, 1984 Order of the trial judge who disregarded petitioner counsel's documented physical inability to comply with court imposed discovery orders and deadlines. In imposing the extreme sanction of dismissal, the trial court equated the unfortunate history of delay to contumacious and/or wilful conduct on the part of petitioner's counsel without affording appropriate weight to the circumstances giving rise to the delay. The United

States Court of Appeals for the Third Circuit affirmed the dismissal by the trial court. The Court of Appeals concluded that:

> (1) because petitioner insisted on assistance of one particular counsel, knowing that counsel to be temporarily physically impaired, petitioner bore personal responsibility for the delays;
>
> (2) critical evidence was lost [though the record contained only inference and no evidence whatsoever as to the critical nature of such evidence];
>
> (3) the record of delay was in and of itself equivalent to contumacious conduct and callous indifference on the part of petitioner's counsel, regardless of the reasons for those delays;
>
> (4) that because the trial court had previously imposed sanctions upon petitioner, [albeit improperly], the extreme sanction of dismissal was the only alternative; and
>
> (5) because the trial judge indicated in dicta in his denial of respondent's second Motion for Summary Judgment, he felt such Motion to have been justifiable therefore petitioner did not have a meritorious case.

ARGUMENT

I. THE RIGHT TO RETAIN COUNSEL IN A CIVIL MATTER IS A PROPERTY RIGHT PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The Court has repeatedly affirmed in several of its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Cooke v. United States*, 267 U.S. 517, 537

(1925). Prior to 1836, the English legal system recognized the right of accused criminals to be represented by counsel only in the trial of less serious crimes while denying representation to alleged felons. *Powell, supra.* at 60; *see also Potashnick v. Port. City Construction Company*, 609 F.2d 1101, 1117 (1980). Because of the anomalous procedures in the English court system, the framers of the United States Constitution specifically provided for the right to counsel in criminal prosecutions, within the Sixth Amendment. Since the English system had long recognized the right to retain counsel in civil matters, the framers of the Constitution felt that there was no need to reaffirm the prerogative. Indeed, studies have shown that the existence of the right to have counsel in civil cases has long been a general assumption in the American legal system. *See*, Note, *The Right to Counsel in Civil Litigation*, 66 Columbia Law Review, 1322, 1327 (1966). [*cited in Potashnick v. Port City Construction Company*, 609 F.2d 1101, at 1117 (1980)].

Protection from the deprivation of property and/or liberty without due process of law is guaranteed through the Fifth and Fourteenth Amendments of the United States Constitution. This right is violated if there is a governmental deprivation of life, liberty or property without notice and fair hearing, which are essential preliminary steps to the passing of an enforceable judgment in a civil proceeding. *See, e.g., Malone v. Central Hanover Bank and Trust Company*, 334 U.S. 306, 313 (1950); *Powell v. Alabama*, 287 U.S. 45, 68 (1932). *Hovey v. Elliot*, 167 U.S. 409, 419 (1897). Historically, the right to a hearing has always been integrally related to the right to the aid of counsel when desired and provided by the party asserting the right. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

If due process entitles one to a fair hearing in a civil matter the foundations exist for deeming the denial of counsel in a civil proceeding a deprivation of a property

right without due process of law. "If in any case, civil or criminal, a state or federal court were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense." *Powell v. Alabama, supra.* at 69; *accord., Roberts v. Anderson*, 66 F.2d 874 (10th Cir. 1973); *Rex Investigative and Patrol Agency, Inc. v. Collure*, 329 F. Supp. 696, 697 (E.D. N.Y. 1971).

It should be noted here the distinctions that exist between the rights of civil litigants and criminal defendants. A criminal defendant's right to counsel arises directly from the Sixth Amendment and includes the right to appointed counsel when necessary. *See, Argensinger v. Handin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 287 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). A civil litigant's right to retain counsel, however, is rooted in Fifth Amendment notions of due process; the right does not require the government to provide lawyers for litigants in civil matters. *Hallom v. Burrows*, 266 F.2d 547 (6th Cir.), *cert. denied*, 361 U.S. 914 (1959). The law affords greater protection to the criminal defendant's right to counsel since he/she is usually faced with a potential loss of personal liberty, and therefore, is deemed to have more at stake than a civil litigant asserting or contesting a claim for damages.

Notwithstanding the civil-criminal dichotomy, both civil and criminal litigants have due process interests at stake and both rely on counsel to protect those interests. In both instances, the party usually lacks the requisite skill and knowledge to adequately prosecute a case, thereby requiring the guidance of counsel in every stage of a proceeding. *See, e.g., Powell v. Alabama, supra.* at 69; *Potashnick v. Port City Construction Company, supra.* at 1118. In both instances, the right to counsel has been deemed one of constitutional dimensions

which should be freely exercised without arbitrary impingement. *Potashnick, supra.*, at 1118; *Swope v. Bratton*, 541 F.Supp. 99 (1982).

There are qualifications to this right, however. Even the right to have counsel of one's choice, in criminal cases, is not absolute. *Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984). The right to retain counsel "must be balanced against the public's interest in the orderly administration of justice." *Linton v. Pernini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*. 454 U.S. 1162 (1982). *See also, United States v. La Monte*, 684 F.2d 672, 673 (10th Cir. 1982); *United States v. Cicale*, 691 F.2d 95, 106-107 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1064 (1974).

To what extent and in what circumstances may a party's due process right be abridged in order to promote the orderly administration of justice? Trial courts have been granted broad discretion when ruling on motions to continue. *Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (1984). "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers and jurors, at the same place at the same time, and thus burden counsel against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances." Yet, this Court has appreciated that the orderly administration of a civil matter may not be used to sacrifice to due process rights of litigants. "*An unreasonable and arbitrary insistence upon expeditiousness in the face of a justified request for delay violates the right to the assistance of counsel.*" *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Morris v. Slappy*, 461 U.S. 1 (1983)

Similarly, a trial court should not unreasonably and arbitrarily impose the extreme sanction of dismissal in the interest of expediency, when faced with justifiable

reasons relating to ill health and temporary disability as the basis for an alleged failure to engage in court ordered discovery. Imposing such a sanction in those circumstances amounts to an abuse of discretion which totally precludes petitioners due process right to the assistance of chosen counsel.

II. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CAUSE OF ACTION DUE TO DELAYS CAUSED BY PETITIONER'S COUNSEL'S KNOWN TEMPORARY DISABILITY, DENIED PETITIONER HER DUE PROCESS RIGHT TO COUNSEL AND HER RIGHT TO A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE MERITS OF HER ACTION.

Federal Rule of Civil Procedure 37(b)(2) allows the trial court broad discretion in imposing sanctions on parties who fail to make discovery. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976); *Digregorio v. First Re-discount Corporation*, 506 F.2d 781 (3rd Cir. 1974). Nevertheless, the due process clause of the Fifth Amendment to the Constitution limits the power of the courts to dismiss an action without affording a party the opportunity for a hearing on the merits. *Societe International v. Rogers*, 357 U.S. 197, 209 (1958). Because of the severity and the extreme results of the extreme sanction, dismissal is ordinarily granted sparingly and then only after less drastic alternatives have been explored. *Ramsey v. Bailey*, 531 F.2d 706, 778, (5th Cir. 1976), *cert. denied*, 429 U.S. 1107, (1977); *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863, 867 (3rd Cir. 1984).

The sanction of dismissal is an appropriate sanction only where a party has acted in "flagrant bad faith" and when counsel's conduct demonstrated "a callous disregard of responsibilities." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 634, 643 (1976).

Further, the sanction is appropriate where there is a clear record of delay or contumacious conduct by the petitioner. *Id.* at 643. Otherwise, dismissal is an abuse of discretion and should not be upheld. *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 234, 236 (8th Cir. 1977).

This Honorable Court in *Societe International v. Rogers*, 357 U.S. 197 (1958), stated that an "abuse of discretion" will arise if the dismissal was the result of a party's inability to comply rather than through "wilfulness, bad faith or fault." *Id.* at 212; *Donnelly v. John-Manville Sales Corporation*, 671 F.2d 337 (3rd Cir. 1982). The reasoning of the court in *Societe* coupled with the reasoning of the court in *Ungar, supra*, reveals that a trial court's imposition of the sanction of dismissal amounts to an abuse of discretion when it rejects a petitioner's counsel's justifiable requests for delay, due to physical disability.

A legitimate excuse for failure to comply with court ordered discovery "would belie classification of [counsel's] conduct as contumacious." See *Green v. Forney Engineering Company*, 589 F.2d 243 (5th Cir. 1979); *Silus v. Sears, Roebuck and Company, Inc.*, 586 F.2d 382 (5th Cir. 1978). In *Green* the court dealt with a counsel's failure to attend a pre-trial conference and comply with the court's request for reply memorandum, due to counsel's gall bladder operation and related medical complication. The majority in *Green* declined to make a determination on the issue of whether counsel's health problems presented a justifiable excuse for failure to prosecute. *Id.* at 247-8. Nevertheless, concurring opinion believed that such conduct presented the court with a "legitimate excuse". Because counsel's explanation of his absence was not disputed and since the non-appearance of counsel was not a deliberate disobedience of the court, his conduct could not possibly be considered "contumacious". *Green, supra*, at 248. [citing, *Loon v. Charles W. Bliven and Company, Inc.*, 534 F.2d 44, 48, (5th Cir. 1976)]. "Moreover, the appellant was in no way

connected with, or responsible for his counsel's absence." "Dismissal is generally inappropriate and lesser sanctions are favored where neglect is plainly attributable to an attorney rather than to his blameless client." *Green, supra*, at 248 [citing, *Silas v. Sears, Roebuck and Company, Inc.*, 586 F.2d 382, 385 (5th Cir. 1978); *Accord, Hassenflu v. Pyke*, 491 F.2d 1094, 1095 (5th Cir. 1974); *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885, 889 (5th Cir. 1968)].

Petitioner herein maintains that the trial court clearly abused its discretion, both under *Societe* and *National Hockey League*, when it dismissed petitioner's cause of action. The record plainly demonstrates that the delays attributable to petitioner were the result of her counsel's health problems, and not the result of "wilful" or "contumacious" conduct. Petitioner counsel's incapacity, which is clearly documented, demonstrates, under *Societe*, inability to comply, rather than "wilfulness", "bad faith" or "callous disregard. How such conduct could even remotely be characterized under any "bad faith" standards can only amount to an abuse of discretion. There is not even a casual relationship between petitioner's counsel's health problems and the behavior necessary to uphold dismissal under *National Hockey League, supra*.

In order to establish the "wilful" or "bad faith" factors of *Poulis*, the district court must first demonstrate that counsel's conduct evidences "callous disregard" of court procedures, as under *National Hockey League, supra*, at 643. In the case at bar the trial court erroneously reasoned that once dilatoriness is shown, that in itself is sufficient to establish the "contumacious" conduct necessary for the sanction of dismissal. Evidence of delay on counsel's part, must be examined carefully for signs of "indifference" or "callous disregard", before concluding that "wilfulness" or "bad faith" is established. Notwithstanding, the district court herein failed to demonstrate even a tenuous connection between counsel's

illness and any degree of "bad faith". The court of appeals further compounded this by relying exclusively on the comments of the district court, and embracing its reasoning, absent any relevant inquiry into the record regarding the "dilatory" aspects of the case and whether the sanction of dismissal was warranted, under *Societe* or *National Hockey League*.

The petitioner most respectfully asserts that the district court's findings of "indifference" were clearly unsupported by the record. To the contrary, the record establishes that the numerous delays in the proceedings can be attributable, at different times, to the conduct of both parties. Furthermore, the delays which can be fairly attributed to petitioner, were strictly the result of counsel's physical incapacity and inability rather than the wilful contumacious conduct which warrants the extreme sanction of dismissal.

The Third Circuit Court of Appeals held in *Poulis v. State Fire and Casualty Company*, 747 F.2d 863 (3rd Cir. 1984), that failure to comply with deadlines imposed by the district court, does not, in itself, demonstrate that petitioner's counsel's conduct was "contumacious". *Id.* at 868. The court in *Poulis* further stated that "a discussion on all the delays involved in the case at best only serves to illustrate dilatoriness and not contumacious behavior". *Id.* at 868. In the instant matter, the district court erred by treating evidence of the former as demonstrating evidence of the latter, when in actuality, excluding an essential step of inquiry, namely, the examination of whether the delay was caused by "callous disregard" or "indifference" to court authority, or whether it was the result of counsel's inability to comply. The record does not support the conclusion that petitioner counsel's conduct was intended to cause delay, or was the result of procrastination. Rather, it reveals counsel attempting to cope with her physical problems and the district court makes a quantum leap in logic, which

flies in the face of all evidence on the record, and concludes that clear evidence of delay attributable to petitioner's counsel incontrovertibly demonstrates the conduct necessary to sustain the sanction of dismissal.

As stated in *Fritz v. Woma Corporation*, 732 F.2d 1178, 1182-83 (3rd Cir. 1984), there must be a knowing disregard for court procedures in order to satisfy the culpable conduct standard. There is no evidence in the record to suggest that counsel was not sincere or honest in her assertions to the court, that her inability to comply with the discovery request was due to recurring physical incapacity, especially when these periods of hospitalization have been fully documented. Moreover, there are no assertions anywhere in the record that counsel's illnesses did not occur as represented. Based on these facts, to hold that counsel's conduct demonstrates "callous indifference" to court orders thereby demonstrating "wilfulness" and/or "bad faith", completely distorts, if not ignores, the "callous disregard" standard declared by this Court in *National Hockey League*. Thus, the District Court's holding demonstrates an abuse of discretion, under Rule 37(b)(2), and violates petitioner's due process right to counsel and fair hearing on the merits of her action.

III. THE COURT BELOW MISINTERPRETED, IF NOT TOTALLY IGNORED CLEAR JUDICIAL PRECEDENT WHEN IT DISMISSED PETITIONER'S ACTION FOR CONDUCT WHICH DID NOT MEET THE NECESSARY CULPABILITY TO SUSTAIN THE ORDER.

Petitioner maintains that the U.S. Court of Appeals for the Third Circuit has misapplied its own guidelines on the appropriate imposition of the sanction of dismissal. These guidelines are set forth as in the opinion of *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863 (3rd Cir. 1984), as well as its predecessors were

ignored. When the Third Circuit affirmed the judgment of the district court dismissing the complaint herein for the alleged failure of petitioner's counsel to obey court orders compelling discovery.

Reasoning that the recent preoccupation with sanctions and the use of dismissal as a necessary "weapon" in the trial court's "arsenal" may be contributing to or creating an atmosphere in which meritorious claims or defenses of innocent parties are no longer the central issue, the *Poulis* Court defined the scope of appellate review over an Order dismissing a case for failure to meet court-imposed deadlines and other procedural requisites. The Court of Appeals declared that the District Court must, as a condition precedent to the exercise of its discretionary power to dismiss a case, balance and consider on the record, the following appropriate factors:

> 1) the extent of the party's personal responsibility;
>
> 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;
>
> 3) a history of dilatoriness;
>
> 4) whether the conduct of the party or the attorney was wilful or in bad faith;
>
> 5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
>
> 6) the meritoriousness of the claim or defense. *Poulis*, *supra*, at 868.

The Third Circuit emphasized the importance of considering alternatives to dismissal, particularly when the petitioner did not personally contribute to the deficiency. *Poulis*, *supra*, at 867.

When applying the *Poulis* factors to petitioner's case, the Third Circuit elaborated only upon the third and fifth factors, respectively, "a history of dilatoriness" and "alternative sanctions". And relied heavily on the findings of the District Court findings which are clearly unsupported by the record. The Third Circuit also misapplied the fourth *Poulis* factor, i.e., "whether the conduct of the party or the attorney was "wilful" or in "bad faith" when it reasoned that mere evidence of dilatoriness without more, clearly supported the contumacious conduct standard necessary culpability. Such a conclusion is decidedly contrary to the reasoning of this Court in both *Societe International, supra.*, and *National Hockey League, supra.*

The Court of Appeals dealt with the remaining three *Poulis* factors, in only a perfunctory fashion and in so doing, abandoned petitioner's due process rights by failing to consider and assign the appropriate weight to all the relevant factors. A brief discussion of those factors is illustrative.

1. Party's Personal Responsibility

There is not a scintilla of evidence in the record on which to conclude that petitioner herself, bore responsibility for any alleged indifference or delays in the proceedings. The *Poulis* court emphasized that in order to bear personal responsibility for the delays in the proceedings, the actions of the petitioner, herself, must somehow result in all the delays in the proceedings. There is absolutely no evidence of this in the record herein. At all times, petitioner's counsel candidly kept both the court and opposing counsel informed, both before and after the facts, of the basis for the delays, clearly attributing them to her illnesses and resulting physical incapacity.

This high Court has specifically expressed in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), that the "extreme sanction of

dismissal" should be upheld only when "flagrant bad faith" on the part of the petitioner, as well as "callous disregard" by counsel of his/her responsibility, is found. *Id.* at 643. The Third Circuit Court of Appeals totally ignored this standard, and attributed personal responsibility to petitioner merely because she wished to retain her present counsel, in spite of her illnesses, and temporary incapacity believing this counsel to be uniquely qualified to handle this cause of action. This behavior on petitioner's part hardly rises to the level of "flagrant bad faith" needed to find dismissal. To hold otherwise constitutes an abridgment of petitioner's Constitutional right to counsel of her choice. Through this right is not absolute, petitioner respectfully contends that a trial court's concern for punctuality in the proceedings is not significant enough in and of itself to support an interference with petitioner's right to counsel, a property right guaranteed by the Fifth and Fourteenth Amendments.

2. Prejudice to the Adversary

The Court of Appeals concluded that there was prejudice to the respondent, by reason of costs associated with filing, briefing and arguing various motions to dismiss, and suggested that "critical evidence" was lost due to the delays. Respondent bears none of those costs inasmuch as when the District Court sanctioned, unfairly, costs to petitioner's counsel, the only party actually prejudiced was petitioner counsel.

The Court of Appeals also believed that critical evidence was lost because of the delays, namely, a dictation tape used to make a certain medical report. After having been provided with a copy of the medical report, respondent's counsel insisted that the dictation tape used when making the report be submitted as evidence, despite the fact that the physician responsible for both the tape and the report attested to the fact that the report was an accurate transcription of the recording.

Respondent's counsel offered no evidence tending to establish that there may be a disparity between the tape and the final typed report. Nor has he presented any evidence which would suggest that the physician was less than honest in his assertion that the report was an accurate transcription. Therefore, the "critical" nature of this evidence remains unsupported by the record and a mystery.

What makes this controversy involving the dictation tape particularly offensive, is the unscrupulous and unsupported suggestion by respondent's counsel that petitioner's counsel has deliberately destroyed or concealed evidence. This is absolutely ludicrous, since there is absolutely no justifiable reason why such "evidence" would be concealed or destroyed in the first place. More importantly, there is no evidence that petitioner counsel ever had such material in her possession. Respondent's counsel also fails to recognize the simple fact that unless, explicitly requested, dictation tapes are rarely be preserved for posterity, especially when dictated more than three months before a deposition.

3. History of Dilatoriness

The Court of Appeals, without more, accepts the trial court's finding that all the delays in the proceedings herein were caused solely by petitioner's counsel. To the contrary, the record clearly reflects that out of a total of twenty-eight (28) months of delays, only eleven (11) months can be attributable to the petitioner or her counsel, while seventeen (17) months can be clearly attributable to the respondent. The first delay, caused by both the hospitalization of petitioner and her counsel resulted in the postponement of the trial date from September 21, 1981, until December 14, 1981.

The second delay was attributable solely to the respondent, who wished to engage in more "meaningful

settlement negotiations". Hence, a new trial date of March 10, 1982, was scheduled.

This third trial date came and went as a result of respondent's failure to provide full and complete answers to petitioner's interrogatories. The subsequent trial date of April 26, 1982 had to be rescheduled because petitioner's counsel had mistakenly believed that defendant would be ready for trial on March 10, 1982 and therefore scheduled surgery for herself from March 20 to 27, 1982. The complications arising from that surgery necessitated re-hospitalization on May 21, 1982, thereby necessitating the re-scheduling of the new trial date of July 6, 1982, until October 18, 1982. If defense counsel had reasonably complied with petitioner's counsel's motion to compel discovery, the March 10, 1982, trial date would have been met and the case concluded before petitioner's counsel was readmitted for surgery on March 20, 1982. For some reason, the courts below ignored these delays attributable respondent's counsel when upon the alleged dilatoriness of petitioner's counsel.

During the fall of 1982, respondent's counsel filed a Motion to Bar Expert Testimony and Quash Trial Subpoena because petitioner's counsel sought to substitute experts, well in excess of one month before trial. Knowing that petitioner's counsel was on trial out of state, the United States Magistrate ruled ex parte on this Motion. Petitioner's counsel appealed this Order, thereby necessitating postponement of the trial date until November 15, 1982, in order to hear oral arguments. Petitioner's appeal was well-founded and raised valid issues and was not instituted for any procedural posturing which could remotely be characterized as dilatorious, nor was the appeal instituted for any reason which could be characterized as "contumacious", i.e., "wilfulness" or "bad faith".

Nevertheless, the trial court assessed petitioner's counsel with costs, without any inquiry or findings that petitioner's counsel acted in "flagrant bad faith" at any

time in the proceedings. Despite the impropriety of this Order, petitioner's counsel willingly assumed these costs.

Shortly thereafter, respondent's counsel withdrew from the proceedings, and new counsel did not enter an appearance until February 18, 1983, over three months after the request for withdrawal by previous counsel. Another month would pass before the new defense counsel requested a status conference for March 15, 1983. Therefore as a result of defendant's counsel's unwillingness to depose petitioner's experts one month before trial, a chain of events followed which eventually created a three month delay in the proceedings. Throughout this period, petitioner's counsel was physically able and willing to proceed with the trial. Nevertheless, the courts below maintain that the delays during this period were due, incredibly, to the dilatory conduct of petitioner's counsel.

It was not until February 27, 1983, that petitioner's counsel suffered a relapse, thereby necessitating re-hospitalization and further surgery. Nevertheless, it should be noted that during this period, respondent's counsel sought an indefinite adjournment in order to become familiar with the file. Petitioner's counsel made clear to respondent's counsel that any requests for adjournment was the request of respondent not petitioner. Therefore, regardless of whether or not petitioner's counsel was physically capable to proceed with discovery or trial, a postponement would have resulted at respondent's counsel's request.

Subsequently, further delays occurred when defense counsel failed to complete discovery within the time frame set out by court. As a result, the October 17, 1983, trial date was postponed until November, 1983. Again, another trial date in which petitioner's counsel was physically capable came and went due to respondent counsel's procrastination.

During November and December, 1983, petitioner's counsel suffered her most serious relapse, necessitating almost constant re-hospitalization for the subsequent six months. It was during this period that defense counsel filed a totally unnecessary motion to compel discovery, concerning, as set out infra, the production of non-existent and totally irrelevant dictation tapes. As a result, petitioner's counsel requested an adjournment in which to respond to defendant's motion. This request was met with indifference by the District Court which responded with an Order compelling discovery by January 9, 1984, with which petitioner's counsel could not possibly comply due to her hospitalizations, which were clearly documented, in the record and Appendix hereto.

Under *Societe International v. Rogers*, 357 U.S. 197, (1958), an abuse of discretion will arise if a dismissal was the result of a party's inability to comply rather than through "wilfulness, bad faith or fault". *Id.* at 212. The courts below appear to have totally disregarded this standard when reviewing petitioner counsel's conduct during this period. Despite clear evidence of physical incapacity, the district court and the Court of Appeals construed petitioner counsel's failure to respond to court orders and deadlines as the product of "indifference" i.e., "callous disregard". *See, e.g. National Hockey League, supra.* at 643.

The assumption that petitioner's counsel merely disregarded court procedures without foundation and completely contrary to the record herein as well as precedent. Though the record evidences a clear pattern of delay, to attribute full responsibility for such solely to petitioner's counsel's conduct and then to assume without more that such conduct was wilful and contumacious, in the face of unchallenged evidence to the contrary, is at the least, an abuse of discretion.

4. Whether the attorney's conduct was wilful or in bad faith.

Under the fourth *Poulis* factor, the courts below conspicuously erred by concluding that the dilatory aspect of the case in and of itself, equated to a "total disregard" and "indifference" on petitioner counsel's part toward discovery, i.e., "wilfulness" and "bad faith". This wholly contradicts the holding in *Poulis*, which could not be clearer in stating that "once dilatoriness is established, that in itself does not prove "wilfulness" or the "contumacious nature" necessary in order to require dismissal. *Poulis*, *supra*. at 868.

Since failure to comply with rules and deadlines in itself, does not equal to "contumacious" conduct, a discussion of the delays involved in the case only serves to illustrate the third *Poulis* factor, dilatoriness and not "wilfulness" and "bad faith". Consequently, the finding by the District Court that dilatory conduct in itself demonstrates "indifference", i.e., "wilfulness" and "bad faith", was reversible error. According to the Supreme Court in *National Hockey League*, *supra.*, the District Court must demonstrate that counsel's conduct evidenced a "callous disregard of responsibility" before the "bad faith" standard necessary to support dismissal can be found. Considering that the trial court was dealing with the problem of a gravely ill attorney's temporary inability to comply with court imposed deadlines, the court below sidestepped this test in reaching its conclusion.

5. Alternative Sanctions

Foremost, it must be noted that the sanction of costs, consistently imposed on petitioner's counsel for the delays in these proceedings, were erroneously and unjustifiably imposed. The *Poulis* court specifically states that under the Federal Rules of Civil Procedure, imposition of fees and expenses on an attorney arise only when there is an unjustified failure to comply with discovery orders

or pretrial orders. *See*, F.R.C.P. 16(f), 37(a)(4), 37(b), 37(d) and 37(g). (cited in *Poulis, supra.* at 869). Nowhere in the record is there any evidence to suggest that the causes of petitioner's counsel's delays were anything other than justifiable and as stated by petitioner's counsel who made every effort to keep the court and respondent's counsel abreast of her condition.

Moreover, an integral prerequisite to the imposition of costs to counsel, is necessary finding of "bad faith" conduct. As previously stated, the Supreme Court in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), proclaimed that the imposition of counsel fees absent a specific finding that counsel's conduct constituted "bad faith", is an abuse of discretion. *Id.*, 766-68.

6. Meritoriousness of the Claim

The *Poulis* court held that "a claim, or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by petitioner or would constitute a complete defense." *Poulis, supra*, at 870. The District Court did not explicitly record its consideration of this factor in its Order of Dismissal. Nevertheless, the Court of Appeals proceeded to re-state the opinion of the District Court during two previous Summary Judgment proceedings to support its determination of the merits of petitioner's case.

There, the District Court held that the case was marginal when it stated that it considered the case to be "very very close". The *Poulis* court explicitly states that summary judgment standards are not to be applied under this determination. *Poulis, supra.* at 870. Nevertheless, the court below rushed to apply the District Court's comments during a Summary Judgment proceeding to determine the merits of the petitioner's case. This is erroneous. Petitioner maintains that, the misapplication of this standard under the sixth *Poulis* factor is error, since

the allegations, if proven at trial, would support recovery on her behalf.

CONCLUSION

The petitioner maintains that both the District Court and the Court of Appeals, by dismissing petitioner's cause of action, have declared that a petitioner who chooses to keep her case in the hands of a temporarily disabled attorney, in whom she has placed her trust, will be deemed to have waived her Fifth Amendment right to due process.

WHEREFORE, in consideration of the Constitutional rights herein at issue, petitioner most respectfully prays that this Honorable Court grant this Petition for a Writ of Certiorari and issue an Order allowing the within matter to stand for briefing on the merits, oral argument and plenary consideration by this Court and directing the court below to certify and transmit the record.

Respectfully submitted,

THOMPSON, LAUREDA & BOSCH

Beverly K. Thompson, Esquire
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5669

REGINA S. ENNIS

vs.

NEW JERSEY BELL TELEPHONE COMPANY and TELEPHONE WORKERS UNION OF NEW JERSEY, LOCAL 827 International Brotherhood of Electrical Workers, AFL-CIO

Regina Ennis,

Appellant

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: September 12, 1985

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5669

REGINA S. ENNIS

vs.

NEW JERSEY BELL TELEPHONE COMPANY and TELEPHONE WORKERS UNION OF NEW JERSEY, LOCAL 827 International Brotherhood of Electrical Workers, AFL-CIO

Regina Ennis,

Appellant

Appeal from the United States District Court
for the District of New Jersey — Camden
(D.C. Civil No. 80-3633)
District Judge: John F. Gerry

Before: ALDISERT, *Chief Judge*, and STAPLETON and MANSMANN, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on August 9, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on September 13, 1984 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

Clerk

August 12, 1985

Certified as a true copy and issued in lieu of a formal mandate on September 20, 1985.

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

Costs taxed in favor of New Jersey Bell Telephone Co. as follows:

Brief. $61.20

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5669

REGINA S. ENNIS

vs.

NEW JERSEY BELL TELEPHONE COMPANY and TELEPHONE WORKERS UNION OF NEW JERSEY, LOCAL 827 International Brotherhood of Electrical Workers, AFL-CIO

Regina Ennis,

Appellant

Appeal from the United States District Court
for the District of New Jersey — Camden
(D.C. Civil No. 80-3633)
District Judge: John F. Gerry

Submitted Under Third Circuit Rule 12(6)
August 9, 1985
Before: ALDISERT, *Chief Judge*, and STAPLETON and MANSMANN, *Circuit Judges*.

(Filed August 12, 1985)

MEMORANDUM OPINION OF THE COURT

ALDISERT, *Chief Judge*.

The question before the court is whether the district court properly followed the teachings of *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3rd Cir. 1984), and its predecessors, in dismissing a complaint for the

failure of the plaintiff and plaintiff's counsel to obey court orders compelling discovery. *Poulis* teaches:

> In exercising our appellate function to determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default, we will be guided by the manner in which the trial court balanced the following factors, which have been enumerated in the earlier cases, and whether the record supports its findings: (1) the extent of the *party's* personal *responsibility;* (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith;* (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and (6) the *meritoriousness* of the claim or defense.

747 F.2d at 868.

We affirm the judgment of the district court for the reasons set forth by the district court in its exhaustive opinion, *reprinted in* app. at 747a-71a; additionally, for the reasons set forth from the bench, *id.* at 736a-40a. We now turn to the *Poulis* factors listed above.

I.

With regard to the first *Poulis* factor, we are satisfied that in the relationships between attorney and client, the plaintiff assumed a personal responsibility throughout these entire proceedings, and that the district court considered this factor. On two separate occasions the district court directly asked plaintiff's counsel, Beverly K. Thompson, whether she had made plaintiff aware of counsel's health problems and whether the plaintiff wanted Ms. Thompson to continue representing her. *Id.* at 592a-93a, 714a-15a, 769a-70a. On both occasions, the court was informed that the plaintiff wanted Ms.

Thompson and no one else to represent her, "despite her knowledge of counsel's troubles with compliance with court rules and orders." *Id.* at 769a-70a. Plaintiff's counsel said that the plaintiff had been advised of the wisdom of obtaining new counsel, *id.*, and declined the invitation.

II.

The second *Poulis* factor concerns prejudice to the defaulting party's opponent caused by the delay. We are persuaded that there was prejudice to the defendant. In imposing previous sanctions against the plaintiff, the court stated:

> The defendant has a right at some point in time, when he comes again and again, as he is forced to do, before this Court for the enforcement of reciprocal discovery obligations and is constantly turned down on his request for sanctions. At some point I wouldn't blame them for throwing up their hands and saying what kind of hall of justice is this? We've been going on here now for three years or so, three and-a-half, and every time we come before this Court, the judge or the magistrate winds up by saying, "Well, let's give her another chance, she's been sick or she's been ill, and there is this excuse or that excuse, that may be legitimate. And so rather than prejudice or penalize the litigant, we won't throw the case out."

Id. at 591a. Moreover, critical evidence was lost. Plaintiff's expert witness, Dr. King, misplaced the original tape recorded report that he had made in this case. *Id.* at 693a. Also, although the cause of action arose in 1979 there was a concomitant dimming of memories caused by the five year delay.

III.

With regard to the third *Poulis* factor, the record is a paradigm of dilatory conduct on the part of plaintiff and plaintiff's counsel. Indeed, the record of dilatoriness is so all-pervasive that it need not be set forth in detail. It is sufficient to note the comments of the district court:

> Ms. Thompson's comments and conduct evidenced an indifference to her obligations to the court and defense counsel. Although she relied upon her disabilities as an excuse and blamed defense counsel for her predicament, the inescapable conclusion is that she was, once again, at least in a position properly to apprise the court and defense counsel of the status of her progress in complying with the court's order and to seek relief if necessary, and that she utterly failed to take the appropriate action.

Id. at 767a-68a. These are findings of the district court which we believe are entirely consistent with the "history of dilatoriness" factor in *Poulis:*

> Time limits imposed by the rules and the court serve an important purpose for the expeditious processing of litigation. If compliance is not feasible, a timely request for an extension should be made to the court. A history by counsel of ignoring these time limits is intolerable.

747 F.2d at 868.

IV.

In finding plaintiff's counsel's conduct to be of sufficient culpability to warrant the dismissal, the fourth *Poulis* factor, the district court expressly stated that her conduct and comments demonstrated "total disregard," app. at 750a, and "indifference" of an "unconscionable" nature toward her obligations as counsel, her responsibilities to her adversary, and toward the court's orders.

Id. at 763a, 767a. Moreover, the district court determined that "Ms. Thompson is fearless in her indifference to this court's order: she has never given the court any indication that she appreciates the gravity of her conduct." *Id.* at 769. Although the court did not use the words willfulness or bad faith, these are not necessary. *Hritz v. Woma Corp.*, 732 F.2d 1178, 1182-83 (3d Cir. 1984). We are persuaded that the district court's use of the words "total disregard" and "fearless . . . indifference" met the condemned conduct standard of "willfulness" or "bad faith."

V.

We next turn to the fifth *Poulis* factor, whether the district court considered the effectiveness of sanctions other than dismissal. Here, too, the court properly addressed this factor:

> The court has already imposed many of the sanctions suggested by the Court of Appeals for the Third Circuit in *Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749 n.6 (1982). Ms. Thompson has been warned on numerous occasions and reprimanded on the record in open court. Costs and attorney's fees have been assessed against the plaintiff and against Ms. Thompson. Experts have been excluded, and the exclusion of any more testimony would be tantamount to a dismissal.
>
> Sanctions not already imposed would be either pointless or inappropriate under the circumstances. It would obviously be ludicrous to place this case at the bottom of the court's calendar as a sanction. Both plaintiff and plaintiff's counsel apparently have great tolerance for delay, but it is the delay suffered by the defendant and the court which is intolerable. To either fine or temporary suspend Ms. Thompson from the practice before this court would not serve

> the ends of justice; nor would conditionally dismissing the suit unless plaintiff secured new counsel. Ms. Thompson is fearless in her indifference to this court's orders: she has never given the court any indication that she appreciates the gravity of her conduct. The court, therefore, does not believe that a fine or temporary suspension would be effective. Furthermore, a temporary suspension would only serve to delay the already long overdue resolution of this matter and would therefore needlessly prejudice the defendant.

App. at 768a-69a.

VI.

Finally, we turn to the sixth *Poulis* factor, the merits of plaintiff's claims. In evaluating this consideration, "we do not purport to use summary judgment standards." *Poulis*, 747 F.2d at 869. Although the district court did not explicitly record its consideration of this factor in its opinion, the court had previously entertained two hearings on motions by the defendant for summary judgment, and commented upon the meritoriousness of appellant's claim: "[I]f I were the defendant in this case, I would have brought this [summary judgment] motion. I think it's perfectly justified. I'm going to deny your motion, but I would have brought it. It's a very, very close case." App. at 172a. Commenting further, the court stated:

> While the record does not present a strong showing of discriminatory intent on the basis of race, this court cannot find that summary judgment is appropriate. For, given all favorable and reasonable inferences drawn in plaintiff's favor, there is something more than the bare fact of discharge.

Id. at 176a. The record therefore contains the district court's evaluation of the merits of plaintiff's case as marginal.

VII.

In sum, we are satisfied that the record supports the conclusion that the district court properly considered all *Poulis* factors prior to dismissing the action with prejudice. Indeed, based on this record, the district court had no other alternative.

We have carefully considered all of the contentions of the appellant. The judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REGINA ENNIS,	:	
Plaintiff,	:	
v.	:	Civil Action No. 80-3633
NEW JERSEY BELL TELEPHONE COMPANY,	:	ORDER
	:	
Defendant.	:	

This matter having come before the court on defendant's motion to dismiss and plaintiff's motion for certification of an issue for interlocutory appeal; and

The court having carefully considered the record, the briefs and the oral arguments of counsel, and for good cause shown;

It is, this 13th day of September, 1984, hereby ORDERED that defendant's motion is granted, and the action is dismissed, with prejudice. Plaintiff's motion is now moot.

JOHN F. GERRY, U.S.D.J.

ENTERED
on
THE DOCKET
on Sept. 13, 1984
ALLYN Z. LITE, CLERK

By_____
(Deputy Clerk)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REGINA ENNIS,	:	
Plaintiff,	:	
v.	:	Civil Action No. 80-3633
NEW JERSEY BELL TELEPHONE COMPANY,	:	OPINION
	:	
Defendant.	:	

APPEARANCES:

Beverly K. Thompson, Esquire
6 Galway Lane
Cherry Hill, New Jersey 08034
Attorney for Plaintiff

Francis X. Dee, Esquire
Carpenter, Bennett & Morrissey
744 Broad Street
Newark, New Jersey 07102
Attorneys for Defendant

GERRY, *District Judge*

The court presently has before it defendant New Jersey Bell Telephone Company's (hereinafter "New Jersey Bell") motion to dismiss and plaintiff Regina Ennis's motion for certification of an issue for interlocutory appeal. Having fully considered the record in this case[1] and with

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1. During the oral argument on these motions on May 18, 1984, and in its letter of June 11, 1984, the court told counsel that it would be making selected correspondence in the case a part of the record, and that counsel would have ten days from receipt of the court's letter and enclosed selected correspondence to submit any correspondence which they believed should also be included in the record. The court's letter was received by Ms. Thompson's office on June 12, 1984. *See* Court Exhibit (hereinafter "C") 34. The court did not receive any copies of correspondence from Ms. Thompson until

keen awareness of the seriousness of this decision, the court has decided to dismiss the action with prejudice. Consequently, plaintiff's motion is moot.

The complaint initiating this action was filed on November 7, 1980. On February 24, 1981, Ms. Thompson made her first request for a continuance. *See* C-1. Defendant's motion for an order to vacate default judgment was returnable on March 6, 1981, and she requested a six week delay because of an impending period of hospitalization. The hearing on the motion was continued to June 3, 1981, at which time it was granted.

Discovery began, and trial was scheduled for December 14, 1981. On November 20, 1981, Judith Musicant, then counsel for New Jersey Bell, wrote to Magistrate James Hammill requesting an adjournment of the trial, in part, because "in spite of continuing efforts she [Ms. Thompson] and I have found it difficult to complete discovery and conduct meaningful settlement discussions due to Ms. Thompson's unfortunate disability and difficulties in obtaining experts' reports." C-2. Magistrate Hammill postponed the trail date to March 15, 1982, due in part to Ms. Thomas's illness. *See* Letter of December 3, 1981 attached to Bennett affidavit of March 6, 1984 as part of Exhibit L. The trial was then adjourned to April 26, 1982.

During a March 5, 1982 oral argument on defendant's motion for summary judgment, the court responded to Ms. Thompson's criticism of defense counsel's filing a motion for summary judgment on the eve of trial by questioning her failure to conduct appropriate discovery at an early stage of the litigation. Transcript of Proceeding of March 5, 1982, 10:25-11:9. She responded by acknowledging that her disability resulted in delays:

June 27, 1984, accompanied by a cover letter dated June 25, 1984. (C-35.) Her submissions were out of time and will not be considered. Defense counsel chose not to make any submissions.

> Your honor, with all due respect, most plaintiffs have healthy lawyers, and the plaintiff in this case should in no way be penalized for the disability of her counsel, of which the court has been aware, opposing counsel has been aware, and which has resulted in the continuances of numerous motions and pretrial conferences.

Id. at 11:13-19. She added:

> I would like to thank the court for hearing argument today so I can go back to the hospital. That was the reason and the sole reason for any delays. In 1981, not only was plaintiff in the hospital, plaintiff was hospitalized and disabled for two months. Plaintiff's counsel was hospitalized a total of five times, resulting in disabilities over a period of nearly six months. So that any other discovery efforts were near impossibilities.

Id. at 11:22-12:5.

On March 16, 1982, Ms. Thompson wrote to the court asking that any action be postponed until after July 1, 1982 because of her need for further treatment of "a recurrent disability" described by her surgeon as a right sided radiculopathy. *See* C-3. In response to her request, the court rescheduled the matter for trial to Tuesday, July 6, 1982, and the Magistrate granted an extension to May 26, 1982 to submit an already overdue joint final pretrial order. *See* C-4. Ms. Musicant wrote to Magistrate Hammill to explain why she had delayed in filing the pretrial order. *See* C-5. No response was forthcoming from Ms. Thompson.

In response to a letter from Ms. Musicant regarding discovery disputes, C-6, Magistrate Hammill scheduled a discovery conference for April 28, 1982. C-7. The letter memorializing the conference indicated that the trial date of July 6, 1982 might have to be continued due to upcoming surgery of Ms. Thompson scheduled for May

14, 1982. *See* Exhibit L attached to Bennett Affidavit of March 6, 1984

On May 7, 1982, Ms. Thompson requested that the case be removed from the trial list for July and placed instead on the list for September or October due to her surgery. *See* C-8. This was done. The trial was adjourned to Monday, October 18, 1982. *See* C-9.

Magistrate Hammill then wrote to Ms. Thompson and Ms. Musicant to praise them for the work they had done on the joint final pretrial order. *See* Exhibit L attached to Bennett Affidavit of March 6, 1984. That order, filed May 25, 1982, provided that William King, M.D., plaintiff's personal physician, would be an expert witness and that "[r]eports to be forthcoming to counsel for defendant. Report has been delayed by counsel's illness." It also provided that "depending upon Judge Gerry's ruling on plaintiff's appeal of Judge Hammill's denial of her motion to compel discovery," Dr. Jerome Staller, an economist/statistician, would be called as an expert witness. (From this, one could conclude that if plaintiff was unsuccessful in her appeal, she would not be calling a statistician.) No such appeal was taken.

In September of 1982, Ms. Thompson requested and was granted an extension of time within which to respond to a motion for summary judgment filed by the defendant. The motion was originally scheduled for September 17, 1982 but was heard instead on October 1, 1982.

On September 27, 1982, a few short weeks before the scheduled trial date of October 18, 1982, Ms. Thompson wrote to Ms. Musicant advising her that "in place of our expert witness, Dr. Jerome Staller, Labor Analyst and Statistican, we will be using Bernard Orr. Additionally, it is still our intention to be using William King, M.D., personal physician of the plaintiff." *See* Exhibit L attached to the Bennett Affidavit of March 6, 1984. Not only did Ms. Thompson substitute a new expert on the eve of trial, but more important she did not

send Ms. Musicant the reports of these experts as she was required to do in the preliminary pre-trial order of June 15, 1982, which required that all experts' reports be exchanged between counsel eight weeks before trial; the preliminary pre-trial order of October 16, 1981, which required the exchange six weeks before trial; and the joint final pretrial order of May 25, 1982.

From the October 27, 1982 letter of Ms. Musicant to Magistrate Hammill and the October 22, 1982 letter of Magistrate Hammill to Judge Gerry, *see* Exhibit L attached to the Bennett Affidavit of March 6, 1984, it appears that Ms. Musicant contacted the Magistrates office on October 4 to notify him of the "experts" problem. The Magistrate attempted to set up a conference call with Ms. Thompson but was informed that Ms. Thompson was in trial the entire week of October 4 and would be unavailable. He then called her office to suggest possible dates during the week of October 11. As of October 12, 1982, Ms. Thompson had not bothered to return the Magistrate's phone call.

On that date, he instructed Ms. Musicant to submit an order barring the testimony of plaintiff's experts. (Her position had been set forth in her letter of October 7.) She did so, *see* C-11, and the order was filed on October 13, 1982. Despite her inability to respond to the Magistrate's telephone inquiries, Ms. Thompson was prompt in responding to the entry of the order. On October 13, 1982, she had a vituperative letter hand-delivered to the Magistrate in which she expressed outrage about the "ex parte" basis on which the matter was handled. A copy of the letter was sent to Chief Jusitce Clarkson S. Fisher of the District of New Jersey. And Ms. Thompson stated that she had instructed her office to contact Judge Fisher's office. She also threatened to contact Judge fisher herself if the Magistrate did not vacate his order and recuse himself. *Id.*

Apparently in total disregard of the import of the order entered by the Magistrate (or of its binding effect),

Ms. Thompson wrote to Ms. Musicant on October 19, 1982 offering her the opportunity to take the depositions of the excluded experts stating that "[p]laintiff is under no obligation under the Federal Rules of Civil Procedure or any pretrial orders to request reports from her experts for the defendant's convenience and at the plaintiff's full expense." She also stated that she was under no obligation to make plaintiff's experts available for depositions. *Id.* (She had never before, so far as it appears in the record, expressed these opinions.) Ms. Musicant declined the opportunity in light of the fact that expert testimony had already been barred. C-12.

In the meantime, Ms. Thompson filed an appeal from the October 13 order. Magistrate Hammill responded to that appeal in order to notify the court of the reasons why he would not rescind his order and to respond to Ms. Thompson's charges that he behaved unethically, and his letter of October 22, 1982 is attached to the Bennett Affidavit of March 6, 1984 as part of Exhibit L.

On November 5, 1982, an oral argument was held on the appeal and on several other motions filed by the defendant and subpoenaed trial witnesses, Local 827, IBEW, AFL-CIO and John Amodeo. The witnesses moved for an order quashing a subpoena served upon them to testify at trial. New Jersey Bell moved for an order quashing a subpoena duces tecum served upon the "Personnel Manager" of New Jersey Bell, and barring the testimony of witnesses who plaintiff indicated in an October 13, 1982 letter (after the close of discovery) would be called at trial, but who had not previously been mentioned in plaintiff's answer to the interrogatory of the defendant seeking the names of witnesses to be called at the time of trial.

In opposition to defendant's motions and in support of her appeal, Ms. Thompson relied upon her medical disabilities, Transcript of Proceedings of November 5, 1982, 3:1-5, particularly upon the fact that she had been

suffering from a medically induced narcotics addiction when she prepared the joint final pretrial order. *Id.* at 6:18-7:17. Presumably, she believed this revelation would relieve her of any responsibilities arising out of that order and the rules of discovery even though she was back to work in early September of 1982.

Although her disabilities may have prevented her from performing her duties during the summer of 1982, it was certainly less clear that they prevented her from understanding what her duties were or, most important, from seeking relief from those obligations from the court before they came due. Accordingly, the court ruled as follows:

> Most of these things boil down, all of these motions pretty much, and I'm excepting out the union's motion because they as a third-party occupy a little different position. But most of these things, seems to me, involve a neglect at the very least, an arguable indifference on the part of plaintiff's counsel to discovery obligations that either arise under the rules of our court or arise by reason of the fact that they have been ordered to be done by a judge of this court. As a result of this, hardships, unfair hardships and burdens have been visited upon the defendant, no question about that, and defense counsel, which I totally accept, of course, without reservation. Were it not for the additional factor of the illness and the substantial and serious surgical procedures that plaintiff's counsel fell heir to during this period of time, there be little question but that the motions addresed here would be summarily granted. No question about that.
>
> But I just cannot do so when I cannot define with any certainty or competence those areas that are excused by a person's illness and perhaps the effects of the medication and the symptomatology and everything associated with those injuries on the one hand,

and the area, the clear area of attorney responsibility on the other. And, in an effort to be completely fair, as is my charge, to all parties, and particularly to the litigants that are involved, I will err on the side of generosity and wherever I am in doubt as to whether or not the defaults of plaintiff or plaintiff's counsel may arguably be the product of these disabilities, I will assume that that is the case.

Now, so what's the bottom line? Setting aside for the moment to what extent the discovery requests should be enforced, you are up against it. I'm going to let these expert — I'm going to require expert reports within five days of today's date. You can take the deposition, I'm going to put off the trial date. Obviously, I'm not going to force you on, Ms. Musicant, or your client, when you haven't had an adequate opportunity. You can't have these things sprung on you at the last minute and then have some judge allow them and force you on to trial. That's not going to happen. I'm taking over this case and you can be sure that it will not happen. On the other hand, in an abundance of caution, and trying as best I can not to preclude any arguably legitimate interest of the plaintiff in the presentation of what she may conceive to be relevant and probative evidence on some critical point of her claim, I'm going to permit it.

Now, five days to get those expert reports from the date of the order. Date of the order? That's not such a good idea either, I suppose. As of today. Can you get those reports out? How many reports do you have, anyway? You have the doctor's report that you say you have on the tape but you couldn't take off?

Ms. Thompson: Yes, Your Honor.

The Court: And how about —

Ms. Thompson: The economist.

The Court: — the economist, statistician?

Ms. Thompson: I can probably get that, I can't spe
for him, but I can certainly do my best to motivate hi

The Court: Well we'll make it perfectly clear th
those reports will be in the hands of Ms. Musicant fi
days from the date of an order that, Ms. Musicant, you
present to me. And if they are not, they'll be barred. Y
know, you got to play fair on both sides of the street. Y
got to think of both parties. How would you feel if som
body went along and dropped experts on line just befo
the date of trial? You can't permit things like that to ha
pen. It's unfair to the other side. And the judge is in
duce of a position because he doesn't like to exclude w
nesses, he may be excluding a party right out of court,
out of a fair trial, and you don't want to do that, eithe
But, a word to the wise now, hopefully, I trust, for yo
sake, and for the sake of your client, and everybody els
but mostly for you that you are in good enough sha
now to meet your responsibilities. I gather that you c
fully do so now. So, I'm clearly defining them for you

Those reports, whether they're available or not —
they're not, if you can't get a report out of your expert,
the very least, what's that rule say, you have to give so
kind of reasonable resume of what the testimony will b
Something like that.

Ms. Thompson: Rule 26(b)(2).

The Court: Whatever that rule says. See that you g
the reports. I see no reason why you can't get reports o
of these people. If you cannot get reports, I will reser
on whether or not I'll permit them to testify, if you get th
reports, they'll be allowed to testify. If we get into th
gray area where you say that, "Oh, I couldn't get the r
ports despite all my efforts and of the resume that I ga
Ms. Musicant was the best that I could do," I'll reserve
that until the time of trial as to whether or not I'll perm
them to testify, depending on what should be a bett
position than to make judgments about how comple

the resume was and whether there was or was not surprise and so on. But in any event, you can take their deposition. The depositions should be at the costs of — the depositions should be at the cost of the plaintiff. I think that's only fair. Now, that takes care of those two. Is it two, King and/or, or it one?

Ms. Thompson: Yes.

The Court: Or was he the person that was replaced? Or is he the replacement?

Ms. Thompson: He's the replacement.

The Court: All right. So that takes care of that one. And that's how we'll handle that.

Id. at 22:12-26:13.

Defendant's motion to quash the subpoena was denied. With regard to the motion to bar witnesses' testimonies, the court held:

> By letter dated October 13, holy smokes, 1982, plaintiff informed defendant that she intends to call the following individuals hitherto allegedly unnamed as trial witnesses: Brewer, Howard, Danilla, Johnson, White. From the morass of papers, accusations and counter accusations in this case, the court cannot conclude with certainty that the plaintiff's failure to name certain witnesses was willful or in bad faith, or not the product of a disability arising out of her medical condition, during the critical time period of the last six months.
>
> There is no question that the plaintiff has breached obligations to respond in discovery, or alternatively to have her witnesses established in sufficient time to afford discovery by deposition. Concomitantly, the defendant surely suffers prejudice from an 11th hour revelation of four or five additional plaintiff's witnesses.

> The entream [sic] sanction of exclusion of testimony might be warranted here — and it probably is, probably is warranted; nobody would ever touch it if the trial judge chose to exercise his discretion; been around long enough to know that — but it's not required given the circumstances. The court should exercise such an extreme sanction only in the rarest circumstances. So, the court will adjourn the trial, as I've indicated, without date and direct that these witnesses may be deposed, if you want to depose them, and that the plaintiffs will bear the reasonable costs of those depositions. The time period on that one probably should follow the same period of the doctors or those other experts.

Id. at 34:24-35:25.

Finally, the court warned Ms. Thompson that in the future serious consequences would result from her defaults:

> Let me see. I had planned to place upon the record of this court certain comments that I have now decided to defer. I have already commented to some extent on what I conceive to be the excesses of, as well as the defaults, of plaintiff's counsel, and I will trust that she is sufficiently sensitive that they need not be repeated or supplemented. There are some potentially serious consequences should this gentle warning not be heeded. (Short pause.) I'm trying to spare you the boredom of listening to me as much as possible here. I'm sure the waiting in silence is less painful.
>
> A couple of fundamentals, let me burden you with. If you are required by an unambiguous court order to do something, you are required to do it. Whether the case law or anything else says to the contrary. You are required to do it. And if you choose not to do it, if you believe it wrong, unauthorized, illegal, you do

> not ignore a court order and take the perilous course of appearing to the court to be indifferent to the mandate of the court. You move against that order before that judge for relief or for correction. Or if you cannot get satisfaction that you think is your entitlement from that judge, if there is an appellate process that is available to you, you take advantage of it. But one of the things you do not do is ignore it. Nor in the presentation of the matter at some later point in time does it lie in your mouth to argue that despite the fact that the unambiguous order was extant at a given moment, that there was no obligation to do that which it required. That's not the way it works.

Id. at 38:8-39:9.

In the months following the November argument, Ms. Musicant withdrew as counsel for New Jersey Bell as she had previously informed the court that she would. Edward Ryan of the firm of Carpenter, Bennett and Morrissey was substituted as defendant's attorney on February 18, 1983. On March 15, 1983, Mr. Ryan requested a status conference with the court to discuss the same discovery problems that had previously been addressed. *See* Exhibit A attached to the Bennett Affidavit of May 14, 1984. On March 18, 1983, Ms. Thompson wrote to the court seeking a continuance of the status conference until some time after May 1, 1983, due to emergency neurosurgery she had recently undergone. *See* Bennett Affidavit of May 14, 1984 at Exhibit B1. The letter referred to an attached copy of a letter from her surgeon which was not enclosed. On March 23, 1983, that surgeon's letter was forwarded to the court. *See* C-13.

The status conference was held on June 28, 1983. As a result of the conference, the court entered an order on July 21, 1983.[2] Once again, plaintiff was given another

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2. The order provided:

1. Plaintiff is barred from calling and offering testimony of

NOTES *(Continued)*

Dr. William King at the trial of this matter unless within thirty (30) days of this order plaintiff shall furnish defendant's counsel a written report concerning the subject matter of his testimony. In the event plaintiff furnishes such report, defendant may depose Dr. William King within thirty (30) days of the receipt of such report.

2. Plaintiff is barred from calling or offering the testimony of any other expert witness unless within two (2) weeks of the date of this order, plaintiff shall in writing identify the name and business location of such expert and shall further provide a copy of a report of any such expert concerning the subject matter of his or her testimony to defendants within thirty (30) days of the date of the writing identifying such expert. In the event the plaintiff provides such written report, the defendant shall have thirty (30) days in which it may take the deposition of such expert.

3. Plaintiff is barred from calling or offering the testimony of Laurie Brewer, Timothy Howard, Deborah Denila, R. F. Johnson, B. J. White or any other witnesses not previously identified unless plaintiff within thirty (30) days of this order shall advise defendant's counsel in writing of her intention as to whether plaintiff intends to call any of the above named individuals as witnesses. In the event plaintiff identifies the above named individuals as witnesses, the defendant may within thirty (30) days of the receipt of such identification by plaintiff's counsel take the deposition of such witnesses.

4. Plaintiff shall within thirty (30) days of this order identify to defendant's counsel the subject matter of testimony sought and the person previously identified by subpoena as "Personnel Manager of New Jersey Bell" and defendant shall identify in writing to plaintiff within two (2) weeks the person or persons competent to testify concerning such subject matter. Plaintiff may within thirty (30) days of receipt of the identification of such person or persons from defendant take the depositions of such person or persons.

5. Defendant may call such additional witnesses determined necessary as a result of the aforesaid depositions providing defendant identifies such witnesses to plaintiff. Plaintiff may depose such witnesses within thirty (30) days of the writing identifying any such additional witnesses.

6. Plaintiff shall bear the reasonable cost of all depositions of plaintiff's witnesses identified pursuant to the above provisions.

opportunity to submit experts' reports and to identify witnesses.

On August 16, 1983, Ms. Thompson sent to Mr. Ryan a copy of Dr. King's report and informed him that plaintiff would be calling James W. L. Cole as an expert witness and would provide his report within two weeks. She stated that Laurie Brewer, Timothy Howard, R. F. Johnson, and B. J. White would be called to testify at trial, and finally, that he should rely on the content of the subpoena seeking the testimony of the personnel manager of New Jersey Bell for identification of the subject matter of that testimony. *See* Exhibit P attached to the Bennett Affidavit of March 6, 1984.

Some time after August 16, 1983, Francis X. Dee took over for Edward Ryan. When noticed that the trial was scheduled for November 7, 1983, Mr. Dee asked for a one week continuance to allow for the completion of discovery. Depositions were scheduled for October; he was having difficulty locating two of the witnesses named by plaintiff; and he needed time to engage an expert statistician to analyze the report of plaintiff's statistician dated August 30, 1983.

Mr. Dee then requested a continuance of three weeks instead of one. *See* Exhibit Q attached to Bennett Affidavit of March 6, 1984. The deposition of Dr. King, originally scheduled for October 12, 1983, was postponed at plaintiff's request to October 19, 1983. When counsel arrived for the deposition on that date, he was advised that it had to be rescheduled. *See* Transcript of Proceeding dated March 12, 1984, 34:17-25. When the deposition finally took place, Ms. Thompson advised Dr. King not to answer certain questions and so defendant was forced to file a motion to compel discovery which

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7. Plaintiff shall identify to defendant's counsel within thirty (30) days of the trial date any and all documents plaintiff intends to offer at trial as evidence which were obtained by plaintiff from the examination of the records of Local 827, International Brotherhood of Electrical Workers, AFL-CIO.

was originally returnable on short notice on November 4, 1983, due to the impending November 7 trial date.

In addition, the deposition of plaintiff's statistical expert was scheduled for November 2, 1983, and he stated that additional time would be needed for defendant's statistical expert to prepare a rebuttal report. There was some difficulty in locating witnesses, and defendant had not been informed of the nature of their anticipated testimony. Finally, although required by the July 21, 1983 order to identify to defendant's counsel within thirty (30) days of the trial date any and all documents plaintiff intended to offer at trial as evidence which were obtained by plaintiff from the examination of the records of Local 827, IBEW, AFL-CIO, plaintiff had not yet done so.

The trial date was continued, and the motion to compel discovery was listed for November 18, 1983. Papers were to be delivered to Magistrate Simandle's office, to whom the matter had been referred, by November 14, 1983. *See* Exhibit C attached to the Bennett Affidavit of May 14, 1984. On November 18, 1983, Magistrate Simandle wrote to counsel confirming that the motion would be continued to December 2, 1983 to give Ms. Thompson additional time in which to respond. Her papers were due on Wednesday, November 23, 1983. *See id.*, Exhibit D.

On November 29, 1983, Ms. Thompson wrote to Magistrate Simandle requesting that the motion be continued to December 16, 1983 due to her health. *See* Exhibit E attached to Bennett Affidavit of May 14, 1984. Once again, the court agreed to adjourn the matter and gave Ms. Thompson until December 9, 1983 to submit papers. Ms. Thompson was cautioned that no further adjournments would be granted. *See* December 6, 1983 letter attached to Bennett Affidavit of May 14, 1984 confirming a telephone conversation of December 1, 1983 with Ms. Thompson's office.

No papers from Ms. Thompson were received on December 9, 1983. On December 13, 1983, Ms. Thompson

wrote to the Magistrate claiming that she did not receive notification that papers in opposition to the motion were due by December 9 — she claimed never to have received the phone message left by the Magistrate, and that the letter of December 6, 1983 was not received in her office until December 12, 1983. Her explanation was that she was out of the office due to her injuries, and that her office was in the process of moving. She does not explain why, after she requested an adjournment, she never bothered to follow up to see if it had been granted or why a phone message made to her office telephone number and a letter sent to her new office address (which did not appear on her letterhead) failed to be received. *See* Exhibit G attached to Bennett Affidavit of May 14, 1984.

On December 15, 1983, Ms. Thompson wrote to Magistrate Simandle confirming his refusal to continue the motion and stating that she was physically unable to respond to the motion, and that she would have to file a motion for reconsideration or an appeal in order to protect her client's interests. *See* Exhibit D attached to Thompson Certification of May 10, 1984.

The Magistrate filed a letter opinion on December 30, 1984, in which he granted in large part the defendant's motion to compel discovery where "the conduct of plaintiff's attorney at Dr. King's deposition in directing the witness not to answer relevant, non-privileged questions was improper and contrary to settled law and rules of court." Letter opinion at 7. The Magistrate denied defendant's request for fees and costs generated by the reconvening of the deposition and the filing of the motion because in his desire to be fair to Ms. Thompson and her client he once again indulged in the assumption that "counsel's conduct was in part the product of her medical difficulties." *Id.*

The order entered by the Magistrate provided as follows:

(1) Plaintiff shall produce Dr. William J. King for a continued deposition at a time and date to be agreed upon by the parties on or before January 23, 1984;

(2) Dr. King shall be required to answer questions regarding plaintiff's claim of compensatory damages, including but not limited to questions concerning plaintiff's medical condition prior to August 17, 1979 and subsequent to March 11, 1980. Dr. King may be required to answer questions concerning communications between him and plaintiff's attorney regarding preparation of his expert report only in the event that his testimony reveals that he relied upon such communications as a factual basis for his opinion, and only to the extent of such facts upon which he relied;

(3) Plaintiff shall produce her medical records for inspection and copying within ten (10) days of this order, except that plaintiff is granted leave to file a motion for a protective order within ten (10) days with respect to any portion of those records that is believed in good faith to be unduly embarrassing in which event all medical records that are not the subject of the motion for a protective order shall be produced within ten (10) days of this order;

(4) Plaintiff shall obtain the tape recording of Dr. King's report and produce it for inspection and comparison by defendant within ten (10) days of this order; and

(5) Defendant's application for costs and attorney's fees incurred in bringing this motion and in reconvening the deposition of Dr. King is hereby denied without prejudice to its renewal in the event of plaintiff's or plaintiff's counsel's non-compliance with this order.

Francis Dee, relying upon the Magistrate's order, wrote to Ms. Thompson on January 11, 1984, demanding plaintiff's medical records and the tape-recorded version of Dr. King's report which were to be turned over to defendant by January 9, 1984. He also proposed dates for the depositions of Dr. King and Dr. Cole. *See* Exhibit C attached to the Bennett Affidavit of March 6, 1984.

He wrote again to her on January 17, 1984, demanding production of the records and advising that he would be forced to file a motion to exclude the testimony of Dr. King and Dr. Cole if she did not respond. *Id.* at Exhibit D.

On that same date, Ms. Thompson wrote to Magistrate Simandle asking if he would allow her "ten (10) days from yesterday's date within which to respond." *See id.*, Exhibit E. She claimed to have been in the hospital from December 16, 1983 to January 7, 1984,[3] and to have returned to her office on January 16, 1984, at which time she opened her mail to discover the December 30, 1983 letter opinion. Obviously, neither Ms. Thompson nor anyone in Ms. Thompson's office was charged with keeping her abreast of what was happening in her cases while she was out of the office.

She also informed the Magistrate that she was again moving her office. Originally it had been located at Suite 330, 216 Haddon Avenue, Westmont, New Jersey. Then she moved to 1301 East Marlton Pike, Cherry Hill, New Jersey. She then represented that as of February 1, 1984, her office would be located at Suite 110, Station House, 900 Haddon Avenue, Collingswood, New Jersey.

Mr. Dee informed the court that he had no objection to giving Ms. Thompson an additional ten days in which to comply with the order but would object to reopening the motion. *See id.* at Exhibit F. Magistrate Simandle,

3. On January 8, 1984, Ms. Thompson responded to an ad which the Magistrate had placed in a local newspaper to rent his house. This is the conversation she refers to in her January 17, 1984 letter.

construing Ms. Thompson's ambiguous request as one for an opportunity to respond to the original motion, denied that request. But he extended the time within which she could file a motion for reconsideration to January 27, 1984; and further provided that if such a motion were filed, the requirements of the December 30 order would be suspended during the determination of the motion for reconsideration. *See* Exhibit G attached to the Bennett Affidavit of March 6, 1984.

No motion for reconsideration was filed by January 27, 1984, nor did plaintiff comply with the requirements of the order by that date. Instead, on January 30, 1984, Ms. Thompson wrote an insulting letter to Magistrate Simandle in which she contended that she did not receive his January 20 letter until the 30th and proceeded to malign both defense counsel and the Magistrate. She did not explain her failure to contact either the Magistrate or Mr. Dee to determine whether any continuance was granted after her January 18 request, nor did she make any reference whatsoever to the records which she had been ordered to give to the defendant. She bluntly concluded, "I . . . will not do anything until you reconsider and pass on the total unfairness of your conduct either by design, happen-stance or misinformation." *See id.*, Exhibit H.

Despite the insulting tone of her letter and her accusations, the Magistrate, wishing "to again relieve Ms. Thompson and, more importantly, her client from any conceivable prejudice whether caused by delay in the mails, the moving of counsel's office, or any other reason beyond the control of this court," *id.* at Exhibit I, gave plaintiff the opportunity to file a motion for reconsideration not later than Thursday, February 16, 1984,[4] and

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4. The trial had been scheduled for February 6, *see* C-15, but had to be continued given the disposition of the matter by the Magistrate.

extended the deadlines for compliance with the order to the same date.[5]

No action whatsoever was taken by Ms. Thompson by February 16, 1984. In an effort to resolve their discovery disputes without having to resort to court acton, Mr. Dee wrote to Ms. Thompson on February 29, requesting that she contact him. (Apparently Ms. Thompson was hospitalized again for a period of time during February and could not be reached at her office.)

With the court's permission, defendant filed a motion for sanctions on short notice on March 6, 1984, returnable March 12, 1984. C-18. The defendant had difficulty effecting service of the motion on Ms. Thompson. She had moved her Philadelphia office from One Franklin Plaza, Suite 930 (the address which appeared on her letterhead), to 1616 Walnut Street. Furthermore, correspondence sent to her Collingswood office was returned "Addressee Unknown." *See* C-19 and Transcript of Proceeding of March 12, 1984, 37:7-11.

On March 9, 1984, Ms. Thompson wrote to the court seeking a continuance of the motion. *See* C-20. Her reason for seeking the continuance was her health. She attached to her letter a letter from Jan Schneider, M.D., in which he stated that she was hospitalized from January 3, 1984 through January 9, 1984[6] and again from February 20, 1984 to February 26, 1984 because of viral gastroenteritis which affected her upper respiratory and intestinal tracts complicated by the fact that she was 20 weeks pregnant. Neither the court nor defense counsel was advised that Ms. Thompson was suffering from this new ailment. *See* Transcript of Proceeding of March 12, 1984, 37:12-18. She also attached a letter from Robin L. Turner, her legal assistant, to John Bennett, Francis

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5. There was also some controversy about whether or not Ms. Thompson had sent Mr. Dee a copy of her January 30 letter. *See* C-16, C-17 and the Magistrate's letter of February 6, 1984.

6. According to Ms. Thompson's letter of January 17, 1984, she was released on January 7, 1984.

Dee's associate, dated March 2, 1984, in which Ms. Turner stated that Ms. Thompson had been ill and hospitalized and returned to her office as of that date.[7]

Although Ms. Thompson accused Mr. Dee of strategically timing his motions to coincide with her periods of debilitation, she did not offer any explanation of why between receipt of the Magistrate's letter of February 6, 1984 and February 16, 1984, a period of time during which she was not hospitalized, she did not make any effort to file a motion for reconsideration or to contact the court herself or through an assistant to explain why she could not file such a motion. Nor why, after becoming aware on March 2, 1984 that Mr. Dee wanted to discuss the discovery problems with her — problems which have plagued this case and have resulted in her being reprimanded by the court in the past — she failed to contact either Mr. Dee or the court between March 2, 1984 and March 9, 1984, when she drafted her letter in opposition to the motion. Finally, her characterization of defense counsel's conduct between November 1982 and October 1983 was inaccurate, to say the least.

The court became aware of Ms. Thompson's objection to the motions being heard on March 12, 1984 that morning. It chose not to call off the motion for sanctions because, after having reviewed the brief and the affidavit in support of that motion, it was clear that no preparation on Ms. Thompson's part was necessary. Defense counsel simply wanted to bring the tortured history of the case before the court, a history with which Ms. Thompson should have been all too well familiar; and, furthermore, the court wanted the case to go to trial.

The oral argument was held on March 12, 1984; and at the time, Ms. Thompson was given an opportunity to state on the record her objections to the motions being

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7. According to Ms. Thompson, she returned to her office on February 29, 1984. *See* Transcript of Proceeding of March 12, 1984, 22:6-10.

heard, as well as her objections to the motions themselves.

The two reasons given by Ms. Thompson for failing to comply with the Magistrate's order were that, despite her efforts to get Dr. King to look for the tape, she still did not know whether it was available, *see* Transcript of Proceeding of March 12, 1984, pp. 12, 39-41, and that she was out of the office for nearly three months and had been physically unable to comply *See id.*

That day was the first time she broached the subject of the possible unavailability of the tape with the court, and she offered no explanation why it had not been brought to the court's attention sooner. With regard to her physical inability to comply, although the court had no doubt that she was ill and hospitalized during the months of December through February, she never justified her failure to make any effort to call either the court or defense counsel in advance of deadlines to ask for extensions nor why, when extensions were granted upon her request, she made no effort to contact the court to find out if they had been granted. She showed a total lack of appreciation of her responsibility to comply with the Magistrate's order. She began arguing the merits of his decision despite her failure to file a motion for reconsideration of or an appeal from that decision. *See id.* at 19. She argued that the discovery problems were not priority matters, *id.* at 20, and should have been resolved on the phone, *id.* at 21, ignoring the fact that she did not return defense counsel's calls and did not initiate any phone conversations. And finally, she tried to shift responsibility to defense counsel by accusing him of failing to go to trial between November 1982 and October 1983, when she was healthy. The record reflects, however, that, although some delay during that period can be attributed to the defendant, Ms. Thompson was allegedly ill during that year and had to be ordered to produce discovery materials long overdue. *See id.* at 31.

Throughout the proceeding, the court made clear t
Ms. Thompson that her conduct was not only prejudic
ing her client but also the defendant and the court an
suggested that she consider withdrawing from the case
See id. at 26-29. She stated that her client was aware o
her problems but nonetheless wanted Ms. Thompson t
continue to represent her. "This happens to be one o
those cases where she does not feel that any other attor
ney can adequately represent her for whatever reasons
It is her right to make those determinations." *Id.* a
30:4-7.

The court chose not to dismiss the action at that time
but warned counsel that that consequence would resul
if she was responsible for any more delays:

> This is just a terrible mess, this case. And I think
> defense counsel has probably summed it up in those
> immortal words of Lord Coke, "Enough's enough."
> And that's about where we are. It's just an agonizing
> history here. And giving plaintiff's counsel every
> conceivable benefit of the doubt, and I think suc
> cessively this record will show that it has been ex
> tended to her time after time after time, but it can't
> go on forever. Because it's not just the interests o
> plaintiff's counsel that's involved here, it's the
> plaintiff's client, it's this court, it's the adversary, the
> defendant, defense counsel, and the burdens tha
> have arisen from this seeming indifference to the re
> sponsibilities of discovery and the orders, clear cut
> unambiguous orders in terms of the orders of thi
> court, seem to me to be unconscienable. I have no
> question in my mind, been wrong before, but I don't
> really have any question that I probably could dis
> miss this action and with this kind of history no on
> would ever touch it in a million years. But, I'm con
> cerned about this woman. Mr. Dee, you've said tha
> you had, despite the very considerable pressures, I'm
> sure, that were brought upon you by your client, i

a decent recognition of the claims of the plaintiff, that you tried on one or more occasions not to oppose certain applications for continuance. . . .

Back in October of 1982, I notice from my most recent review while I've been listening to these arguments, Judge Hammill barred the testimony of these expert witnesses from whom the appropriate discovery had not been received, way back when. I'm not going to dismiss, I'm not going to dismiss this complaint, but I am going to — it would be awkward and probably improper to reinstate his order, but in effect that's what I'm going to do. I'm going to grant the alternative relief which is sought by your motion, and I'm going to bar the testimony of Dr. King and any other expert, including the other fellow whose deposition had been refused. Pending the outcome of a seemingly totally unrelated discovery problem relating to Dr. King. What's the other man's name?

Mr. Dee: Dr. Cole, Your Honor.

The Court: All right, his testimony will also be barred. The court will not consider any further applications by plaintiff for permission to obtain expert testimony. This matter is going to go to trial, you can bet your bottom dollar on that. And counsel fees and costs will be assessed against plaintiff's counsel, not against plaintiff, against plaintiff's counsel, for the costs and expenses and attorney's fees incidental, Gentlemen, to this application today, this application. I'm not going to pick up on the other ones. And additionally, the order, Mr. Dee, which I'll ask you to prepare and submit to the court, will also provide a trial date, a fixed and certain advance trial date. What say, Pat? How about six weeks, something like that? We've gone three and a half years, we can afford six weeks more. Because my intention here is to provide a trial date, and a certain trial date, as much

as that is ever possible, so as to clearly indicate
plaintiff that this case will not be tried on that da
and that the court will not, and I'm advising yo
Miss Thompson, the court will not postpone that tr
by reason of the physical or medical or other disab
ities that plaintiff's counsel may suffer. So, I
warning your client through you of the existence
this provision of the order and I'm providing a su
ficiently advanced trial date so that if you feel or t
plaintiff feels that they cannot honor that trial da
because of any disability of plaintiff's counsel, t
plaintiff should make other arrangements in w
shall represent the plaintiff at that time. That is t
trial date and the case will be tried on that date. A
the parties are all fairly warned of the consequenc
of failure to move. I'll dismiss the action if the ca
is not moved for any reason at that time, absent son
illness or something on the part of the plaintiff, wi
which we cannot deal. Okay. April the 30th, Ap
the 30th, at 9:30 in this courtroom. Thank you.

Transcript of Proceeding of March 12, 1984, 43-46.

The court further allowed that the order disposing
the motion provide that plaintiff's counsel should pr
vide defendant's counsel with specific answers to an i
terrogatory propounded on plaintiff in 1981 whi
sought the substance of the anticipated testimony of pe
sons identified by plaintiff as trial witnesses. *Id.* at 50-5
The order so provided, and further provided th
"[w]ithin twelve (12) days after the date of the filing
this order, plaintiff's counsel shall provide defendan
counsel with a complete and specific identification of a
and all documents obtained by plaintiff's counsel fr
her examination of the records of Local 827, Inter
tional Brotherhood of Electrical Workers, AFL-CI
which plaintiff intends to offer as evidence at trial,
required by the order of this court filed on July 21, 19
. . . . Ms. Thompson did not make any objections to

form of the order which was sent to her by Mr. Dee on March 19, 1984. *See* C-21. The order was filed on April 3, 1984, with some revisions made by the court.

During the March 12 argument, Ms. Thompson informed the court and defense counsel that her office address in New Jersey was 2627 Jarvis Road, Sicklerville, her residence; and that in November of 1983, she moved her Philadelphia office from One Franklin Plaza to 1616 Walnut Street, Suite 2100. All correspondence was sent to those addresses.

On March 27, 1984, Magistrate Simandle sent counsel notification of a settlement conference to be held on April 5, 1984, at 12:00 noon. C-22. That conference was adjourned at Ms. Thompson's request to allow her to attend the sale of her farm in Ohio. C-23. It had to be rescheduled for April 24, 1984 to accommodate Ms. Thompson's trial schedule. *Id.*

In the meantime, Mr. Dee wrote to Ms. Thompson on April 13, 1984, expressing concern about his unsuccessfull attempts to deliver a copy of the April 3 order to her Sicklerville office, [8] *see* C-24, and requesting that she comply with that order immediately. She sent him a letter on April 23, 1984, many days after discovery was due, confirming some conversation between her legal assistant and Mr. Dee about her availability and unavailability to communicate with him, never referring to her obligations under this court's April 3 order. C-25. Mr. Dee responded by letter dated April 26, 1984, *see* C-26, to clarify what he believed were inaccuracies in Ms. Thompson's letter. Regardless of the recriminations contained in those letters, what is clear is that during the weeks that followed her receipt of the order, Ms. Thompson made no attempt to contact the court or defense counsel about her failure to comply.

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8. Copies of executed orders are sent to all counsel of record as a routine matter by the Clerk's office of the District on the day they are filed. Therefore, Ms. Thompson should have received a copy of the order in advance of Mr. Dee's attempts to serve it upon her.

At the conference held on April 24, 1984, for which Ms. Thompson was two and three quarter hours late, without prior notice to the court or defense counsel, *see* Transcript of Proceeding of May 18, 1984, 52:19-23, attempts to settle the case were unsuccessful. C-27. On the previous day, Mr. Dee had filed a motion to dismiss for plaintiff's failure to obey discovery orders and to limit issues for a jury trial, which was returnable on the day of trial, April 30, 1984. The Magistrate adjourned the matter to May 18, 1984 and gave Ms. Thompson, who indicated she intended to file a motion for certification of an issue for appeal pursuant to 28 U.S.C. §1292(b), until April 27, 1984 to file the motion. *Id.*

Following the settlement conference, Magistrate Simandle wrote to Ms. Thompson requesting her to inform the court in writing not later than May 2, 1984 of the telephone number and address of her bona fide New Jersey office. C-28. Shortly thereafter, the court received a copy of a letter from Mr. Dee to Ms. Thompson in which he sent a photocopy of an envelope which indicated that she had moved from her Sicklerville address and left no forwarding address. C-29. On May 2, the Magistrate received a letter bearing the letterhead address of 6 Galway Lane, Cherry Hill, New Jersey, from Robin Turner, Ms. Thompson's legal assistant, in which she stated that Ms. Thompson was ill and would discuss the matter with him when she returned to her office. C-30. The Magistrate wrote immediately informing her that her reply was unresponsive to his request and demanding a written response within 24 hours of her receipt of the letter. C-31. On May 8, 1984, she wrote to the Magistrate enclosing "a copy of corresondence which I directed Ms. Turner to send to the United States Posta Authorities. I believe same is self -explanatory," C-32. I was a request for change of address. What is not self explanatory is why Ms. Thompson failed to notify th

court and defense counsel of her change of address in the beginning of April when she notified the postal authorities.

In the same letter, she enclosed copies of a motion for certification and leave to appeal which was to have been filed by April 27, 1984, by order of the Magistrate, *see* C-27, and was not filed until May 10, 1984. Interestingly, Ms. Thompson also sent a letter to the Magistrate on May 8, 1984, purportedly confirming the instructions he had given counsel during the settlement conference with regard to the filing of motions, instructions which he had himself confirmed in his April 26 letter but neglecting to include the deadline which she had once again failed to meet.

On May 18, 1984, the court held oral argument on defendant's motion to dismiss and plaintiff's motion for certification. When directed to focus her argument and address the merits of the issue of her default under the April 3 order, Ms. Thompson could not satisfactorily justify her failure to comply, or absent compliance, to seek relief from the court in advance of the deadlines contained in the order.

She claimed that she did not have time to compile the list of union records, and in fact that up to that time she had never personally reviewed them.

> [W]e have done what is required of us as we were able to do it. If we have no list and we do not know what records we intend to use at this time, then we have no list we can supply of union records in regard to those individuals as we have repeatedly advised Mr. Dee.

Transcript of Proceeding of May 18, 1984, 26:7-11. She also argues that she and/or her secretary had verbally answered interrogatory 13 regarding the substance of trial witnesses' testimony in part during phone conversations in 1983, *see id.* at 35:7-38:25; and that with regard to other named trial witnesses, although she had

not informed Mr. Dee, she had decided not to call them at the time of trial. *See id.* at 39. She also referred the court to a letter she had written in 1983, Exhibit F attached to her brief in opposition to the motion to dismiss, which was not responsive to the discovery request and was obviously irrelevant. *See id.* at 40:18-41:3 and 42:12-43:8.

Again, Ms. Thompson's comments and conduct evidenced an indifference to her obligations to the court and defense counsel. Although she relied upon her disabilities as an excuse and blamed defense counsel for her predicament, the inescapable conclusion is that she was, once again, at least in a position properly to apprise the court and defense counsel of the status of her progress in complying with the court's order and to seek relief if necessary, and that she utterly failed to take the appropriate action.

Mindful of the case law in this Circuit which admonishes trial judges to consider less severe sanctions than dismissal with prejudice and to adhere strictly to Rule 37 which does not permit dismissal when failure to comply to discovery orders is due to inability,[9] the court has considered all alternative sanctions and applied almost all of them and assumed wherever possible that Ms. Thompson's defaults were caused by her inability to perform. But it now finds that no sanction short of dismissal is appropriate.

Plaintiff's counsel's physical disabilities have contributed to her failure to properly prosecute this matter.

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9. *See Matter of MacMeekin*, 722 F.2d 32 (3d Cir. 1983); *Madesky v. Campbell*, 705 F.2d 703 (3d Cir. 1983); *Gross v. Stereo Component Systems, Inc.*, 700 F.2d 120 (3d Cir. 1983); *Titus v. Mercedes Benz of North America*, 695 F.2d 746 (3d Cir. 1982); *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339 (3d Cir. 1982); *Quality Prefabrication v. Daniel J. Keating Co.*, 675 F.2d 77 (3d Cir 1982); *Harris v. Cuyler*, 664 F.2d 388 (3d Cir. 1981); and *A Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32 (3d Cir 1979).

There is no disputing that. And the court has been sympathetic and understanding. It has been more; it has bent over backwards to allow counsel to present plaintiff's case. But what the court took great pains to excuse continually as counsel's inability to perform her duties, it can no longer so excuse. Looking back over the years of this aged litigation, there emerges a pattern of indifference on Ms. Thompson's part to the orders of this court and the right of the defendant and defense counsel.

The court has already imposed many of the sanctions suggested by the Court of Appeals for the Third Circuit in *Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749 n.6 (1982). Ms. Thompson has been warned on numerous occasions and reprimanded on the record in open court. Costs and attorney's fees have been assessed against the plaintiff and against Ms. Thompson. Experts have been excluded, and the exclusion of any more testimony would be tantamount to a dismissal.

Sanctions not already imposed would be either pointless or inappropriate under the circumstances. It would obviously be ludicrous to place this case at the bottom of the court's calendar as a sanction. Both plaintiff and plaintiff's counsel apparently have great tolerance for delay, but it is the delay suffered by the defendant and the court which is intolerable. To either fine or temporary suspend Ms. Thompson from practice before this court would not serve the ends of justice; nor would conditionally dismissing the suit unless plaintiff secured new counsel. Ms. Thompson is fearless in her indifference to this court's orders: she has never given the court any indication that she appreciates the gravity of her conduct. The court, therefore, does not believe that a fine or temporary suspension would be effective. Furthermore, a temporary suspension would only serve

to delay the already long overdue resolution of this matter and would therefore needlessly prejudice the defendant.

It is that same concern which leads in large measure to the court's conclusion that a conditional dismissal would not be a fair disposition of the defendant's motion. Given the present state of the file, the court cannot imagine that a substitute counsel could be quickly secured, if counsel could ever be found.

In addition, there is no reason why the sanction should not be visited upon the plaintiff herself. A client is bound by the actions of her attorney. As the Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962) noted:

> Petitioner voluntarily chose this attorney as his representative in this action and he cannot now avoid the consequences of the acts of omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Accord, Walker v. Sun Ship, Inc., 684 F.2d 266-69 (3rd Cir. 1982) (*cited in Titus v. Mercedes Benz of North America*, 695 F.2d at 750 n.9). This is especially so where the client has been apprised of the wisdom of securing new counsel.

On two separate occasions, the court questioned counsel about whether she had made her client aware of her problems and whether she, i.e., Regina Ennis, wanted her to continue representing her. *See* Transcript of Proceeding of March 12, 1984 at 26-29. On both occasions, Ms. Thompson represented to the court that her client did not want anyone else to represent her, despite her knowledge of counsel's troubles with compliance

with court rules and orders. During the May 18, 1984 oral argument, the following colloquy took place:

> The Court: Have you made your client at any time aware of this court's inquiry as to the wisdom of your continued presence as her counsel in this matter?
>
> Ms. Thompson: I have made her aware, I have also made other clients aware.
>
> The Court: Well, don't talk about other clients, I'm just talking about this client and this case. You are representing to me, are you, that your client, though reasonably informed, has decided that she wishes you to continue and wants you to continue as her counsel in this case?
>
> Ms. Thompson: Yes, Your Honor. I have not only discussed it with her, I have discussed it with her treating physicians and her psychiatrist out of my concern for her possible need for a resolution of this matter for psychiatric reasons, as well as for economic reasons. I've discussed it with Dr. King. I discussed it with her psychiatrist Dr. North, who have both indicated to me, as has Ms. Ennis, that it is her extreme feeling if I abandon her at this point she will feel totally abandoned. She has directly communicated to me, when I advised her of the defendant's offer to settle and advised her that it might be worth considering because of the need to resolve it once and for all, that if I was willing to keep trying, then I was what she wanted. I gave her the alternative of taking their offer, of getting another attorney.
>
> The Court: I'm trying to explore every avenue that I can possibly explore before considering more onerous avenues.
>
> Ms. Thompson: I have done everything in my power to encourage her to resolve it for her own

health. And it's the opinion of herself and her psychiatrist that she is at this point better off if I stay with her. And I have done that out of my own interests, too, Your Honor, I have to admit that. And out of a need to take some of the pressure off of me for health reasons. But I also have obligations morally, emotionally to my clients. If the defendants are spending much more on attorney's fees than —

The Court: Excuse me just for a minute. If I were to ask you, I guess I've already done that, to consider voluntarily withdrawing as counsel after you were satisfied, of course, that your client was represented by competent substitute counsel, if I were to ask you that again, I take it your response would be the same, that you feel, having discussed this thoroughly with your client, that it is in her best interests for you to continue.

Ms. Thompson: That is my belief.

The Court: All right.

Ms. Thompson: Otherwise, Your Honor, quite honestly, I don't need the additional pressure. When I took my oath, however, I took it seriously.

Transcript, 32-34. *See also id.* at 16:23-18:9.

In conclusion, the court can but reiterate its belief that considering Ms. Thompson's conduct in light of the age of this matter and all past unsuccessful attempts to accommodate her and impose sanctions upon her and her client. The court is left with no alternative but to dismiss this action with prejudice. Accordingly, the defendant's motion will be granted. Plaintiff's motion is therefore moot.

The court will enter the accompanying order.

JOHN F. GERRY, U.S.D.J.

DATED: September 13, 1984.